Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1997

WILMA BEARDEN,

Petitioner,

vs.

QUORUM HEALTH GROUP INC.; and QHG OF GADSDEN INC., d/b/a GADSDEN REGIONAL MEDICAL CENTER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

MYRON K. ALLENSTEIN
Counsel of Record
ALLENSTEIN & ASSOCIATES
Attorneys for Petitioner
141 South 9th Street
Gadsden, Alabama 35901
(256) 546-6314

146365

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

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QUESTIONS PRESENTED

Whether evidence that Petitioner, age 55, a long-time employee of Respondent, QHG of Gadsden, Inc., was treated less favorably than two younger, short-time, less qualified employees in the same department during a Reduction In Force (RIF) creates an inference of age discrimination so as to present a *prima facie* claim of age discrimination for summary judgment purposes?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	ii
Opinions Below	1
Statement of Jurisdiction	1
Statutes Involved	1
Statement of the Case	2
Reasons for Granting the Writ	3
Argument	4
The Fact that Petitioner Was Treated Less Favorably than Younger Employees in the Same Department During a RIF is Sufficient Evidence of a *Prima Facie* Claim for Summary Judgment Purposes.	4
Conclusion	9

TABLE OF CITATIONS

Cases Cited:

Barnes v. Southwest Forest Indus., Inc., 814 F.2d 607, (11th Cir. 1987)	8, 9

Contents

	Page
EEOC v. Manville Sales Corp., 27 F.3d 1089 (C.A.5 1994) at 1096	6
Montana v. First Federal S & L of Rochester, 869 F.2d 100 (2d Cir. 1989)	6
Perkie v. Group Technologies, Inc., 845 F. Supp. 852 (M.D. Fla. 1994)	7
White v. Westinghouse Electric Co., 862 F.2d 56 (C.A.3 1988) at 60.	7
Whitten v. Farmland Industries, Inc., 759 F. Supp. 1522	5

Statutes Cited:

28 U.S.C. § 1254(1)	1
29 U.S.C. § 623(1)	1
29 U.S.C. § 626	3
29 U.S.C. § 626(1)	2

Rule Cited:

Supreme Court Rule 10.1(c)	1

Contents

Page

APPENDIX

Appendix A — Opinion of the United States Court of Appeals for the Eleventh Circuit Filed December 31, 1997 ..... 1a

Appendix B — Memorandum Opinion of the United States District Court for the Northern District of Alabama, Middle Division Dated January 14, 1997 ..... 3a

Appendix C — Order of the United States District Court for the Northern District of Alabama, Middle Division Dated January 14, 1997 ..... 7a

Appendix D — Opinion of the United States Court of Appeals for the Eleventh Circuit Filed March 3, 1983 ..... 9a

Appendix E — Order of the United States District Court for the Northern District of Alabama, Middle Division Dated January 28, 1997 ..... 10a

Petitioner Wilma Bearden respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals regarding the grant of summary judgment for employer on an age discrimination case.

OPINIONS BELOW

The District Court opinion and the opinion of the Eleventh Circuit Court of Appeals are unreported.

STATEMENT OF JURISDICTION

The case to be reviewed is *Wilma Bearden v. Quorum Health Group Inc., et al.*, (unreported, 12/31/97) (App. A). Petition for rehearing was denied 3/3/98 (App. D). The District Court judgment (1/14/97) is Appendix C with the memorandum opinion as Appendix B. The District Court denied a request for reconsideration (1/28/97) (App. E).

This Court has authority for this review under 28 U.S.C. § 1254(1) and Rule 10.1(c), Rules of the Supreme Court.

STATUTES INVOLVED

Prohibition of age discrimination, 29 U.S.C. § 623(1):

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer —

> (1) to fail or refuse to hire or to **discharge** any individual or otherwise discriminate against any individual with

> respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; . . . [Emphasis supplied.]

Civil actions, 29 U.S.C. § 626(1):

> (1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such **legal** or **equitable relief** as will effectuate the purposes of this chapter: . . . [Emphasis supplied.]

STATEMENT OF THE CASE

Petitioner, a Human Resources Department employee at age 55 with 12 years of service and with excellent reviews, was terminated during a RIF on August 24, 1995. The hospital employer had recently been purchased by Quorum Health Group, Inc., a large hospital management company.

At the time of termination, there were five other employees in the Human Resources Department who were ages 34, 39, 28, 43 and 39 (R2-27-A-2). Six months prior to the termination, two of the above employees, ages 39 and 28, were added to the Human Resources Department (R2-27-L-14; R2-27-A-1). At the time of Petitioner's termination, one of the new employees had below-average evaluations (R2-27-C) and her probationary work period had been extended by three months due to her poor evaluations (R2-27-L-38-39).

In granting summary judgment to the hospital, the District Judge held that Petitioner failed to present a *prima facie* case. The court ruled that there was no inference of age discrimination when Petitioner was treated less favorably than the two younger new hires in the same department even though one of the younger employees was on probation:

> Finally, plaintiff must show some evidence by which a fact finder might reasonably conclude that the employer intended to discriminate on the basis of age. *Id.* Plaintiff attempts to fulfill her burden with evidence that in the six months prior to her termination two persons aged 28 and 39 were hired into the department in which plaintiff worked. One of these two new persons had below-average evaluations and was on probation at the time plaintiff's position was terminated. However, in *Barnes v. Southwest Forest Indus., Inc.*, 814 F.2d 607, 610 (11th Cir. 1987), the Eleventh Circuit noted that there was no inference of age discrimination from the fact that new employees were on probation at the time that an older employee was fired. Similarly, the facts presented in this case fail to show intent to discriminate. By failing to show that the employer intended to discriminate on the basis of age, plaintiff has not made out her prima facie case under *Earley*.

(R-Excerpts 32-4)

Federal jurisdiction exists under 29 U.S.C. § 626.

REASONS FOR GRANTING THE WRIT

The writ should be granted because the Eleventh Circuit decision affirms the District Court decision which conflicts with decisions of the Second, Third and Tenth Circuits as to whether an inference of discrimination is created when an older employee is treated less favorably than a less qualified younger employee in the same department during a Reduction In Force. This is an important issue because the Eleventh Circuit holding allows an employer to hire a younger employee, have a

Reduction In Force, and terminate the older employees because a Reduction In Force was "needed". The only reason a Reduction In Force was "needed" in the Human Relations Department was because of the new hires. In reality, a younger employee was hired and, as a result, an older employee was fired. These facts should create an inference of age discrimination, just as if the older employee was fired first and the younger employee hired as a replacement. Under the standard enunciated by the lower court, the discharged older employee can never create an inference of discrimination when the employer calls the discharge a "Reduction In Force".

ARGUMENT

THE FACT THAT PETITIONER WAS TREATED LESS FAVORABLY THAN YOUNGER EMPLOYEES IN THE SAME DEPARTMENT DURING A RIF IS SUFFICIENT EVIDENCE OF A *PRIMA FACIE* CLAIM FOR SUMMARY JUDGMENT PURPOSES.

The circuits which have addressed the issue are in agreement that a showing that employee was treated less favorably than younger employees during a RIF not only creates an inference, but also satisfies Petitioner's burden of proof of a *prima facie* claim for summary judgment purposes.

> In the context of a reduction-in-force (hereinafter "RIF"), an employer terminates employees, but the discharged employees are not replaced by new employees. Thus, the fourth element in the prima facie case of a discriminatory discharge cannot be satisfied. The discharged employee is usually unable to show actual replacement. The Tenth Circuit has therefore modified the fourth prima facie element by requiring the plaintiff to "produc[e] evidence,

> circumstantial or direct, from which a fact finder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." *Branson v. Price River Coal Co.*, 853 F.2d 768, 771 (10th Cir. 1988) (quoting *Williams v. Gen. Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981), *cert. denied*, 455 U.S. 943, 102 S.Ct. 1439, 71 L.Ed.2d 655 (1982)). **This element may be established "through circumstantial evidence that the plaintiff was treated less favorably than younger employees during the reduction-in-force."** *Lucas v. Dover Corp., Norris Div.*, 857 F.2d 1397, 1400 (10th Cir. 1988) (quoting *Branson v. Price River, supra*, 853 F.2d at 771).

Whitten v. Farmland Industries, Inc., 759 F. Supp. 1522 (Kan. 1991) at 1532.

In a situation similar to the case at hand, the Second Circuit Court of Appeals held:

> When the correct standard is applied to these circumstances, it is clear that Montana did establish a prima facie case. There is no dispute over the first three elements: at 56 years of age she was within the protected age group; she was qualified for her job; and she was discharged. As to whether the circumstances of her discharge raise a permissible inference of age discrimination, (1) **the majority of her responsibilities were not eliminated, but were transferred to a twenty-six year old overworked coworker**, Rossi; (2) shortly thereafter some of Rossi's responsibilities were transferred to another twenty-six year old woman hired as a compensation analyst; and (3) Montana

> was not offered the position of either of these younger women. From this evidence a reasonable fact-finder could **infer that Montana was disadvantaged in favor of the younger employees, and thereby made a victim of age discrimination**.

Montana v. First Federal S & L of Rochester, 869 F.2d 100 (2d Cir. 1989).

The Fifth Circuit has held the following:

> *A showing that a discharged employee was clearly better qualified than younger retained employees is merely one of many ways that a plaintiff can show that a reduction-in-force was a mere pretext for age discrimination. See Uffelman v. Lone Star Steel Co.*, 863 F.2d 404, 408 (5th Cir.), *cert. denied*, 490 U.S. 1098, 109 S.Ct. 2448, 104 L.Ed.2d 1003 (1989) (*employee may prove pretext in reduction-in-force case by showing preferential treatment of younger employees prior to discharge of older employee*); *Walther v. Lone Star Gas. Co.*, 952 F.2d 119, 124 (5th Cir. 1992) (statistical information sufficient to prove pretext and support verdict for plaintiff in reduction-in-force context). The EEOC and Mitte may prevail without a showing that he was **clearly** better qualified than those employees who were not terminated. (Emphasis supplied.)

Footnote 5, *EEOC v. Manville Sales Corp.*, 27 F.3d 1089 (C.A.5 1994) at 1096. The Third Circuit has established the same test:

> The particulars of the showing required to establish a prima facie case depend on the factual circumstances. *McDonnell Douglas*, 411 U.S. at 802

> n. 13, 93 S. Ct. at 1824 n. 13. In a reduction in force when a complaining employee is not replaced, he, as "a plaintiff alleging a discriminatory layoff need show only that he is a member of the protected class and that he was laid off from a job for which he was qualified while *others not in the protected class were treated more favorably*." (Emphasis supplied)
>
> . . . . .
>
> Westinghouse does not assert that he was not qualified for his job. Westinghouse retained three members of the Transportation Department under 40 years of age, and therefore not in the protected class. This establishes a prima facie case and shifts to Westinghouse the burden of producing some legitimate, non-discriminatory reason for discharging White.

White v. Westinghouse Electric Co., 862 F.2d 56 (C.A.3 1988) at 60.

Likewise, in *Perkie v. Group Technologies, Inc.*, 845 F. Supp. 852 (M.D. Fla. 1994), in which the facts are similar to this case, the court found that Plaintiff presented a *prima facie* case by showing that he was discharged in lieu of other younger, less experienced employees:

> *Age Discrimination.* It is undisputed that Plaintiff, 58 years old at the time of his termination, is within the protected class under the ADEA, which prohibits discrimination against employees within the age bracket of 40-70. Plaintiff provides that he was qualified for the new, consolidated job because

> he was entrusted with "more than double the responsibility of any of the younger females retained after his discharge" and because Defendant was forced to rely on a 20-year old incident with another employer to defend Plaintiff's termination. Despite Plaintiff's qualifications, he was rejected by Defendant for continued employment. Finally, Plaintiff provides evidence of discrimination by showing that younger employees outside the protection of the ADEA were retained, and that these employees did not have skills in both inventory and production control. Plaintiff has set out a sufficient prima facie case.

845 F. Supp. at 856.

There are also significant differences in the facts and the claims between *Barnes*, the decision relied upon by the District Court, and the present case. In this case, Petitioner was treated less favorably than two new hires in the same department who were less qualified. The complaining employees in *Barnes* were displaced guards who were replaced by a private company which contracted to provide security. The Plaintiffs in *Barnes* did not challenge their termination. Instead, they challenged the decision not to rehire them.

> It is significant that plaintiffs on appeal do not allege age discrimination in regard to the decision to transfer the responsibility for security to an outside company. Southwest presented evidence that its decision to close down its in-house security department was prompted by **valid economic considerations**. Plaintiffs have not disputed this evidence and have not alleged that Southwest's decision was actually **motivated by discrimination**.

> Rather, they argue that Southwest discriminated by failing to retain or rehire them in other jobs in the mill. (Emphasis supplied.)

Barnes v. Southwest Forest Indus., Inc., 814 F.2d 607 (11th Cir. 1987) at 610.

> Their suit charged that defendant discriminated against them by failing to retain them in *other positions and by failing to rehire them once they had been terminated.* (Emphasis supplied.)

Id. at 608. The *Barnes* decision is not applicable to the present case, and it should not have been the basis of summary judgment for the employer.

CONCLUSION

WHEREFORE, Petitioner submits that her petition should be granted because the District Court and the Eleventh Circuit have adopted an improper and a harsh standard in assessing whether an older employee has created an inference of discrimination when the older employee is treated less favorably than a younger employee in the same department who is less qualified.

Respectfully submitted,

MYRON K. ALLENSTEIN
Counsel of Record
ALLENSTEIN & ASSOCIATES
Attorneys for Petitioner
141 South 9th Street
Gadsden, Alabama 35901
(256) 546-6314

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED DECEMBER 31, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-6120
Non-Argument Calendar

D. C. Docket No. CV-96-L-968-M

WILMA BEARDEN,

Plaintiff-Appellant,

versus

QUORUM HEALTH GROUP, INC.; QHG OF GADSDEN, INC., d.b.a. Gadsden Regional Medical Center,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(December 31, 1997)

Before HATCHETT, Chief Judge, EDMONDSON, Circuit Judge, and FAY, Senior Circuit Judge.

Appendix A

PER CURIUM:

AFFIRMED. *See* 11th Cir. R. 36-1.[1]

"Costs taxed against Plaintiff-Appellant."

Entered: December 31, 1997
For the Court: Thomas K. Kahn, Clerk

By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 3/12/98

---

1. 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, MIDDLE DIVISION DATED JANUARY 14, 1997

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

CV 96-L-0968-M

WILMA BEARDEN,

Plaintiff,

vs .

QUORUM HEALTH GROUP, INC.; GADSDEN REGIONAL MEDICAL CENTER, a corporation,

Defendant.

MEMORANDUM OPINION

Plaintiff and defendants have made cross-motions for partial summary judgment relating to plaintiff's claim under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq*. The issues involved in these motions have been analyzed by the undersigned and his law clerk. It is clear to this court that plaintiff has failed to make out the prima facie case of age discrimination. Thus this court today orders that the motion of defendants for partial summary judgment will be granted, and plaintiff's motion for partial summary judgment will be overruled.

From 1983 until August 24, 1995, plaintiff was employed as a human resources assistant in the personnel department of

Gadsden Regional Medical Center. On August 24, 1995, plaintiff was discharged from her employment. She was aged 55 at the time of her discharge.

Plaintiff brought suit in this court on April 17, 1996 and alleged that defendants had violated the ADEA and that she was owed benefits under ERISA for unpaid comp time. On June 12, 1996, plaintiff added a claim under ERISA for breach of fiduciary duty. Plaintiff voluntarily dismissed this breach of fiduciary duty claim on November 27, 1996, and this court subsequently ordered that this dismissal was to be with prejudice. On January 6, 1997, this court granted plaintiff's voluntary dismissal of her claim under ERISA for unpaid comp time. On that same day, plaintiff's complaint was also amended to add a claim for unpaid camp time outside the framework of ERISA. With today's summary judgment as to the ADEA claim, plaintiff's only remaining claim is a claim outside the scope of ERISA for unpaid comp time.

In reviewing a motion for summary judgment, the motion is granted if there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(c); *United States v. Four Parcels of Real Property in Greene and Tuscaloosa Counties in the State of Alabama,* 941 F.2d 1428, 1437 (11th Cir. 1991). The evidence of the non-movant is to be believed, and the court is not to engage in jury functions such as determining credibility and weighing the evidence. *Four Parcels,* 941 F.2d at 1437. However, when the non-movant bears the burden of proof at trial and a motion for summary judgment has been made, the non-movant bears the burden of coming forward with sufficient evidence on each element that must be proved. *Earley v. Champion International Corp.*, 907 F.2d 1077, 1080 (11th Cir. 1990). If on any part of the prima facie case, there would be insufficient evidence to require submission of the case to a jury, summary judgment is appropriate. *Earley*, 907 F.2d at 1080.

Appendix B

The first step in analyzing a motion for summary judgment under the ADEA is to determine whether the plaintiff has presented a prima facie case of discrimination. *Id.* at 1081. This prima facie case can be made in one of three ways: (1) direct evidence of discriminatory intent, (2) statistical proof of disparate treatment, or (3) meeting a test such as the one set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Earley*, 907 F.2d at 1081.

Plaintiff has offered no evidence of discriminatory intent and no statistical proof of disparate treatment. Thus if plaintiff is to prove the prima facie case, she must do so under the test derived from *McDonnell*.

The Eleventh Circuit has set out three elements derived from *McDonnell* that a plaintiff must show in order to establish a prima facie case of employment discrimination: (1) that the plaintiff was in a protected age group and was adversely affected by an employment decision, (2) that the plaintiff was qualified for the current position or to assume another position at the time of discharge or demotion, and (3) that there exists some evidence by which a fact finder might reasonably conclude that the employer intended to discriminate on the basis of age. *Earley*, 907 F.2d at 1082. If the plaintiff fails to show its prima facie case, then defendant's motion for summary judgment is due to be granted.

Under *Earley*, because plaintiff was fired by defendant at the age of 55, she was in a protected age group and was adversely affected by an employment decision. Second, because the depositions show that plaintiff was receiving extraordinary evaluations as little as seven months prior to her termination, it seems that she was qualified for the current position.

Appendix B

Finally, plaintiff must show some evidence by which a fact finder might reasonably conclude that the employer intended to discriminate on the basis of age. *Id.* Plaintiff attempts to fulfill her burden with evidence that in the six months prior to her termination two persons aged 28 and 39 were hired into the department in which plaintiff worked. One of these two new persons had below-average evaluations and was on probation at the time plaintiff's position was terminated. However, in *Barnes v. Southwest Forest Indus., Inc.*, 814 F.2d 607, 610 (11th Cir. 1987), the Eleventh Circuit noted that there was no inference of age discrimination from the fact that new employees were on probation at the time that an older employee was fired. Similarly, the facts presented in this case fail to show intent to discriminate. By failing to show that the employer intended to discriminate on the basis of age, plaintiff has not made out her prima facie case under *Earley*.

By failing to make out the prima facie case, summary judgment against plaintiff is appropriate. Accordingly, by separate order, summary judgment against plaintiff as to plaintiff's ADEA claim is hereby entered.

DONE this 13th day of January 1997.

s/ Seybourn H. Lyons
SENIOR JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, MIDDLE DIVISION DATED JANUARY 14, 1997

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

CV 96-L-0968-M

WILMA BEARDEN,

Plaintiff,

vs.

QUORUM HEALTH GROUP, INC.; GADSDEN REGIONAL MEDICAL CENTER, a corporation,

Defendant.

ORDER

This cause comes before this court on the cross-motions for partial summary judgment filed separately by plaintiff and defendant.

In accordance with the accompanying memorandum opinion, this court hereby GRANTS defendant's motion for partial summary judgment and OVERRULES plaintiff's motion for partial summary judgment. Accordingly, plaintiff's Count I, relating to the Age Discrimination in Employment Act, is hereby DISMISSED. Plaintiff's sole remaining claim is Count IV, contained in the second amendment to the complaint.

Appendix C

DONE this 13th day of January 1997.

s/ Seybourn H. Lyons
SENIOR JUDGE

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED MARCH 3, 1983

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 97-6120

WILMA BEARDEN,

Plaintiff-Appellant,

versus

QUORUM HEALTH GROUP, INC.; QHG OF GASDEN, INC., d.b.a. Gadsen Regional Medical Center,

Defendant-Appellees.

On Appeal from the United States District Court
for the Northern District of Alabama

BEFORE: HATCHETT, Chief Judge, EDMONDSON, Circuit Judge, and FAY, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by the appellant is, denied.

ENTERED FOR THE COURT:

s/ Joseph W. Hatchett
UNITED STATES CIRCUIT JUDGE

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, MIDDLE DIVISION DATED JANUARY 28, 1997

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

WILMA BEARDEN,

Plaintiff,

vs .

QUORUM HEALTH GROUP, INC.; GADSDEN REGIONAL MEDICAL CENTER, a corporation,

Defendant.

ORDER

On January 14, 1997 this court granted defendant's motion for partial summary judgment and found that plaintiff had failed to make out its prima facie case under the Age Discrimination in Employment Act. Further, on January 23, 1997 this court dismissed without prejudice the remainder of this case for lack of subject matter jurisdiction.

This cause now comes before the court on plaintiff's motion for new trial, for reconsideration of its January 14, 1997 order, or for interlocutory appeal of the January 14, 1997 order. This court hereby DENIES the motion for new trial or for reconsideration. Further, as this court has previously dismissed this case without prejudice, the motion to allow for interlocutory appeal is MOOT.

Appendix E

DONE this 28th day of January 1997.

s/ Seybourn H. Lyons
SENIOR JUDGE